Supreme Court, U.S.
FILED
APR 12 1995
OFFICE OF THE CLERK

No. 94-1359

In the Supreme Court of the United States

OCTOBER TERM, 1994

PHILIP W. CLEMENTS AND SHIRLEY F. CLEMENTS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioners' notice of appeal was untimely filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-7a) is unpublished, but the decision is noted at 32 F.3d 569 (Table). The decisions of the district court (Pet. App. 8a-9a, 10a-13a, and 16a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1994. A petition for rehearing was denied on September 12, 1994. Pet. App. 1a-2a. On November 29, 1994, Justice Stevens entered an order extending the time within which to file a petition for a writ of

certiorari to and including February 9, 1995. The petition for a writ of certiorari was filed on February 9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners ran a mink farm on property in Mecosta County, Michigan. In 1976, they obtained a loan through the Farmers Home Administration (FmHA). In 1982, the priority lienholder, the First National Bank of Evart, foreclosed on the property. FmHA purchased the property at the foreclosure sale for $127,348.62, which included a $79,948.38 payment to the Evart bank. Pet. App. 4a.

Under Michigan law, petitioners had one year from the date of the sale to redeem the property. On the day the one-year period expired, petitioners filed for Chapter 13 bankruptcy. During the course of the bankruptcy proceedings, the bankruptcy court determined that petitioners could redeem their property by paying $120,700 to FmHA in installments. Over the next four years, petitioners paid FmHA $61,095.88, but fell behind in their payments. In 1988, FmHA moved to dismiss petitioners' Chapter 13 plan for failure to make payments. In 1989, the bankruptcy court denied FmHA's motion, holding that petitioners' debt to FmHA was not discharged and that FmHA retained all of its rights and remedies against them. Pet. App. 4a.

In January 1991, FmHA sent petitioners a notice of eviction. In May, FmHA sent a second letter ordering petitioners to vacate the property by June 28, 1991. When petitioners refused, the United States brought this suit seeking an order to vacate. Pet. App. 5a.

2. The district court held a show cause hearing on August 12, 1992, to determine ownership of the property. At the conclusion of the hearing, the district court ruled from the bench that FmHA was the rightful owner of the property and ordered petitioners to vacate within 90 days. Pet. App. 24a-25a. The court nevertheless invited petitioners to file a motion for reconsideration, noting that petitioners had raised claims that FmHA had violated its own regulations regarding farm loans of this type, but that petitioners had not tied those claims to the question whether the order to vacate should be issued. The court cautioned counsel for petitioners that if petitioners intended to file a motion for reconsideration, "it should be filed at the earliest possible opportunity regardless of what time period may be set forth in the federal rules for purposes of allowing the court to fully consider whatever additional claims [petitioners] may have that have not been fully set forth on the record." *Id.* at 25a-26a. The court added that petitioners should be prepared to vacate the property within 90 days, as ordered, and that the court would not consider an extension of that time "merely because a motion for reconsideration has been filed in this case." *Id.* at 26a.

The court then instructed government counsel to "prepare an order that simply makes reference to the court's ruling * * * and makes reference to the opinion from the bench." Pet. App. 26a. The court further directed government counsel to file the "order or judgment" by the following week. *Ibid.* Government counsel complied and, on August 19, 1992, the district court signed an "Order to Vacate"

that incorporated by reference its August 12 oral opinion. *Id.* at 16a-17a.

On November 10, 1992, one week before the 90-day period for vacating the premises expired, petitioners filed a motion to reconsider, which the district court denied on May 24, 1993. The court held that the motion to reconsider was untimely under Federal Rule of Civil Procedure 59(e), and that it did not seek relief based upon any of the reasons that are cognizable under Rule 60. Pet. App. 12a-13a. On June 17, 1993, petitioners filed a notice of appeal from both the May 24, 1993, order denying reconsideration and the August 19, 1992, order to vacate. *Id.* at 5a.

3. On June 13, 1994, while petitioners' appeal was pending in the court of appeals, the district court entered a "Declaration of Judgment" (Pet. App. 8a-9a) stating that it had come to the court's attention that "a 'judgment order' making clear that the Court's August 19, 1992 order effectively adjudicated the only claim before the Court, was never entered." *Id.* at 9a. So as "to dispel any ambiguity in or confusion about the character of the Court's August 19, 1992 order," the court *sua sponte* declared, "*nunc pro tunc*, that the August 19, 1992 order of the Court is the Court's award of JUDGMENT in favor of [the United States] and against [petitioners] on the claim stated in the complaint." *Ibid.* The court stated in a footnote that its "Declaration of Judgment" "[was] not intended to alter the substantive rights and duties of the parties in any way, but effect[ed] merely a technical completion of the record." *Id.* at 9a n.1.

4. The court of appeals concluded that it lacked jurisdiction to review the August 19, 1992, order to vacate the premises, and it therefore dismissed the appeal to that extent. Pet. App. 6a-7a. The court held

that the August 19 order was a final decision, and that petitioners' failure to file a notice of appeal within 60 days of that order deprived the court of jurisdiction. *Id.* at 6a. The court of appeals considered and affirmed the district court's May 24, 1993, denial of petitioners' motion to reconsider, concluding that the district court had not abused its discretion in denying that motion under Federal Rule of Civil Procedure 60(b)(6). Pet. App. 7a.[1]

ARGUMENT

In a civil case to which the United States is a party, Federal Rule of Appellate Procedure 4(a) establishes that the time for appeal ends 60 days after "entry of the judgment," and that a judgment is deemed entered when it has been "entered in compliance with Rul[e] 58 * * * of the Federal Rules of Civil Procedure." Fed. R. App. P. 4(a)(1) and

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[1] Petitioners subsequently filed a notice of appeal from the Declaration of Judgment on June 30, 1994, and later, on August 24, 1994, a "corrected" notice of appeal from "all" orders and decisions of the district court, including, but not limited to, the Declaration of Judgment. On October 6, 1994, the court of appeals, *sua sponte*, dismissed those appeals for lack of jurisdiction. App., *infra*, 1a-3a. The court concluded that *res judicata* barred jurisdiction over the appeal from the Declaration of Judgment. *United States* v. *Clements*, Nos. 94-1751 & 94-2048 (6th Cir. Oct. 6, 1994) (order dismissing appeals for lack of jurisdiction). App., *infra*, 2a. The court also held that the "corrected" notice of appeal was untimely because "[n]o substantive orders follow[ed] the Declaration of Judgment"; "[the amended] notice of appeal was filed more than sixty days after the entry of the Declaration of Judgment, and the time in which [petitioners] could obtain an extension of time for appeal has now expired." *Id.* at 2a-3a (citing Fed. R. App. P. 4(a)(5)). Petitioners do not appear to seek review of those rulings.

(7). Rule 58, in turn, provides that a judgment is effective only when set forth "on a separate document." The court of appeals correctly determined that the district court's August 19, 1992, order was a final judgment under Rule 58, and that petitioners' notice of appeal therefrom was untimely. That unpublished ruling warrants no further review.

1. Petitioners assert (Pet. 8) that by soliciting a motion for reconsideration, establishing a briefing schedule for that motion, and setting a 90-day period for petitioners to vacate the contested property, the district court "expressed a clear intention of revisiting the merits of the petitioners' defenses to the government's eviction suit," and thereby indicated that its order to vacate was not final. That contention lacks merit.

By inviting petitioners to file a motion to reconsider, the district court did not suggest that its ruling was not a final judgment against them. To the contrary, the court expressly stated that "under the circumstances of this case, [petitioners] should be prepared to vacate this property within 90 days and the court will not consider an extension of that time merely because a motion for reconsideration has been filed in this case." Pet. App. 26a.

The district court regarded the motion to reconsider as cognizable, if at all, under Federal Rule of Civil Procedure 59(e) or 60. Pet. App. 12a. Motions to alter or amend a judgment under Rule 59(e), or for relief under Rule 60, suspend the finality of a judgment only if served within ten days after entry of judgment. Fed. R. App. P. 4(a)(4)(C) and (F); Fed. R. Civ. P. 59(e). Because petitioners' motion for recon-

sideration was untimely—a conclusion petitioners do not contest—it could not have tolled the period for filing a notice of appeal from the August 19, 1992, order to vacate.[2]

Similarly, the fact that the district court exercised its discretion to allow petitioners a grace period in which to vacate the premises before execution of its order did not alter the finality of the court's judgment. Cf. *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do *but execute the judgment.*") (emphasis added) (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)). The court's August 12, 1992, ruling, finding that the government was entitled to possession of the property in question and ordering petitioners to vacate the premises within 90 days, fully adjudicated the only claim pending before the court, and was, therefore, final. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 308 (1962) (noting, as indicium of finality, that "the District Court disposed of the entire complaint filed by the Government").

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[2] Contrary to petitioners' contention (Pet. 9), the district court did not "reverse[] itself" by finding petitioners' motion to be untimely. At the time of its August 12, 1992, ruling from the bench, the court expressly admonished petitioners' counsel to file a motion for reconsideration at the earliest possible opportunity "regardless of what time period may be set forth in the federal rules." Pet. App. 25a-26a. This case is therefore distinguishable from *Thompson* v. *INS*, 375 U.S. 384 (1964) (per curiam), in which this Court found a notice of appeal to be timely where a litigant failed to appeal a final judgment in reliance on the district court's assurances that his Rule 59 motion was timely.

2. Petitioners are correct in asserting (Pet. 6-9) that a final judgment is effective for purposes of appeal only when set forth on a "separate document," in compliance with Federal Rule of Civil Procedure 58. See Fed. R. App. P. 4(a)(7); *Shalala* v. *Schaefer*, 113 S. Ct. 2625, 2632 (1993). In this case, however, the district court's August 19, 1992, order to vacate (Pet. App. 16a-17a) satisfied the "separate document" requirement.

The August 19 order was "separate" from the district court's August 12 "ruling * * * [and] opinion from the bench" (Pet. App. 26a), and was formally entered on the court's docket on August 20, 1992.[3] The order, moreover, was succinct in nature, see *United States* v. *Perez*, 736 F.2d 236, 237-238 (5th Cir. 1984) (per curiam) (holding succinct order denying relief to be a separate judgment under Rule 58); *Hughes* v. *Halifax County School Board*, 823 F.2d 832, 835 (4th Cir. 1987) ("Brevity is an important factor: an order unaccompanied by a long explanation is likely to be considered a 'judgment.'"), and contained no legal discussion, see *United States* v. *City of Kansas City, Kansas*, 761 F.2d 605, 606 (10th Cir. 1985) (memorandum discussing legal issues did

[3] The district court stated in its June 13, 1994, Declaration of Judgment that "a 'judgment order' making clear that the Court's August 19, 1992 order effectively adjudicated the only claim before the Court, was never entered." Pet. App. 9a. Item 15 on the docket sheet shows, however, that the August 19, 1992, order was entered on August 20, 1992. C.A. App. 4. The August 12, 1992, oral ruling was entered on August 13, 1992. *Ibid.*

not qualify as separate document).[4] The August 19 order therefore satisfied Rule 58.[5]

Petitioners, moreover, identify no conflict among the courts of appeals regarding the question presented. Indeed, Rule 58's separate document requirement "has been applied consistently throughout the circuits," *Mason* v. *Groose*, 942 F.2d 515, 516 (8th Cir. 1991), cert. denied, 502 U.S. 1039 (1992), including the circuit from which this case arises. See, *e.g.*, *United States* v. *Woods*, 885 F.2d 352, 353 (6th Cir. 1989) (per curiam) (order written in margin of party's motion did not satisfy Rule 58); *Huecker* v. *Milburn*, 538 F.2d 1241, 1243 (6th Cir. 1976) (court lacked appellate jurisdiction over one of two consolidated cases where no separate order was

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[4] The fact that the August 19, 1992, order "incorporate[d] by reference [the district court's] oral opinion" of August 12, 1992 (Pet. App. 16a) did not alter its effect. See, *e.g.*, *Mason* v. *Groose*, 942 F.2d 515, 516 (8th Cir. 1991) ("compliance with Rule 58 is not impaired when * * * the separate document is entitled 'order' rather than 'judgment' and contains reference to an accompanying document"), cert. denied, 502 U.S. 1039 (1992); *Alman* v. *Taunton Sportswear Mfg. Corp.*, 857 F.2d 840, 842-843 (1st Cir. 1988) (order satisfied Rule 58 despite cross-reference to independent memorandum).

[5] The court of appeals concluded that "not only do the two entries in question [the August 19, 1992, and May 24, 1993, orders] make it clear that the August 19, 1992, order was indeed a final order, but also the district court expressly declared that the August order was a final order in a Declaration of Judgment *nunc pro tunc* filed on June 13, 1994." Pet. App. 6a (citation to record omitted). Petitioners are correct (Pet. 9, 11) that if the August 19, 1992, order to vacate was not final when entered, the June 13, 1994, *nunc pro tunc* Declaration of Judgment could not retroactively render the August 19, 1992, order a final judgment.

entered); see also *Freeman* v. *Shalala*, 2 F.3d 552 (5th Cir. 1993) (per curiam) (period for seeking attorney's fees had not begun where separate Rule 58 judgment had not been entered); *Mitchell* v. *Idaho*, 814 F.2d 1404, 1405 (9th Cir. 1987) (per curiam) (entry of memorandum opinion and order containing facts, law, and explanatory language did not satisfy Rule 58). Accordingly, petitioners' case-specific argument that the August 19, 1992, order to vacate did not satisfy Rule 58 does not warrant this Court's review.

3. Petitioners also argue (Pet. 10-11) that the court of appeals' acceptance of jurisdiction over their appeal from the denial of their motion for reconsideration "conflicts" with its refusal to review the August 19, 1992, order to vacate, and is inconsistent with *Shalala* v. *Schaefer*, *supra*. As discussed above, petitioners' June 17, 1993, notice of appeal was ineffective as to the district court's August 19, 1992, order because it was filed more than 60 days after entry of final judgment. Consequently, the court of appeals correctly concluded that the only remaining order from which appeal could be taken was the district court's May 24, 1993, order denying reconsideration. The June 17 notice of appeal was timely as to that order.

Even if, as petitioners contend (Pet. 10), no formal Rule 58 judgment was entered as to the May 24, 1993, order, the court of appeals' consideration of petitioners' appeal of that order was fully consistent with *Schaefer*. This Court stated in *Schaefer* that "a formal 'separate document' of judgment is not needed for an order of a district court to *become* appealable." 113 S. Ct. at 2632; see also *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 387 (1978) (per curiam) (absence

of separate judgment does not alone defeat appellate jurisdiction).

Contrary to petitioners' contention (Pet. 10-11), the rule set forth in Federal Rule of Civil Procedure 54(b), that an order "which adjudicates fewer than all the claims * * * shall not terminate the action as to any of the claims," is inapposite. As this Court explained in *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976), "Rule 54(b) 'does not apply to a single claim action * * *. It is limited expressly to multiple claims actions in which "one or more but less than all" of the multiple claims have been finally decided and are found otherwise to be ready for appeal.'" *Id.* at 742-743 (footnote omitted) (quoting *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956)). Because the district court's August 19, 1992, order finally adjudicated the only claim in this case, it did not implicate Rule 54(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1995

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 94-1751/2048

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT

v.

PHILIP W. CLEMENTS; SHIRLEY F. CLEMENTS,
DEFENDANTS-APPELLANTS

[Filed Oct. 6, 1994]

ORDER

BEFORE: LIVELY, JONES, AND SILER, CIRCUIT JUDGES.

These two appeals are brought by the defendants in an action commenced by the federal Farmers Home Administration (FmHA) to eject them from real property and declare the FmHA the rightful owner of the property. A court of appeals has a duty to consider *sua sponte* whether appellate jurisdiction has been properly invoked. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 740 (1976).

Based upon our review, we conclude that these appeals are not within this court's jurisdiction.

This matter was previously before this court, and we shall not repeat the facts. *See United States v. Clements*, No. 93-1887 (6th Cir. July 27, 1994) (unpublished per curiam). In our earlier opinion, we held that the defendants' attempt to appeal the final order of August 19, 1992, was untimely. To the limited extent that we had jurisdiction to review the order of May 24, 1993, we affirmed the district court. We specifically noted that the district court's Declaration of Judgment entered on June 13, 1994, was an express declaration that the earlier August 19 order was final. En banc reconsideration of the decision in No. 93-1887 has been denied.

Now, in Case No. 94-1751, the defendants have filed a notice of appeal from the Declaration of Judgment. We conclude that this notice of appeal does not confer the court with appellate jurisdiction. In the prior appeal, we declined to examine most issues raised by the defendants because of the untimely nature of the appeal, despite the defendants' arguments that we had jurisdiction to do so based upon the entry of the Declaration of Judgment. In view of that ruling, now *res judicata*, the notice of appeal in 94-1751 from the Declaration of Judgment gives us no new jurisdiction to review the merits of the district court's action. In essence, it is a notice of appeal from a judgment which has no substantive effect.

Additionally, the defendants have filed an "amended" notice of appeal which has been docketed in this court as Case No. 94-2048. That notice of appeal purports to be from "all" orders and decisions of the district court, including, but not limited to, the Declaration of Judgment. No substantive orders follow the Declaration of Judgment. The notice of

appeal was filed more than sixty days after the entry of the Declaration of Judgment, and the time in which the defendants could obtain an extension of time for appeal has now expired. *See* Rule 4(a)(5), Fed. R. App. P. Thus, even if the notice of appeal in 94-1751 provided this court with some basis for jurisdiction, the appeal in 94-2048 would be untimely. We therefore lack jurisdiction in both appeals.

It is ORDERED that these appeals are dismissed *sua sponte* for lack of appellate jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk